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Supreme Court, U.S.
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No. 94-1418

In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE SUE FLOTT,

Petitioners,

vs.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR, and J. JERRY SHIELDS

Respondents.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE BRIEF AMICUS CURAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT:

The Respondents, The Village of Oakwood, Willard S. Norton, John W. Grimwade, Morris L. Phillips, L. Homer Orr, and J. Jerry Shields, respectfully request that this Court

deny the Motion of the American Planning Association for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of the Petition for Writ of Certiorari submitted by Petitioners, George A. Chiavola and Connie S. Flott.

OBJECTION TO REQUEST FOR LEAVE

The American Planning Association has sought leave to file a Brief Amicus Curiae in the above captioned case. In accordance with Supreme Court Rule, counsel for the American Planning Association sought the consent of the attorneys for the Respondents for the request to file an Amicus Curiae Brief in Support of the Petition for Certiorari filed by the Petitioners. Counsel correctly notes that the consent of Respondents was not given.

Respondents did not give consent to the American Planning Association for a number of reasons: 1) the Petition for Writ of Certiorari has not been granted; 2) the present fact situation upon which the Petition for Writ of Certiorari is based is not nor could it be a case of national importance; 3) the request to file a Brief Amicus Curiae is base upon a faulty assumption, i.e., that no planning of any kind has been undertaken by the Village for the past forty years; and 4) there has been no attempt to show why or how the Petitioners are not in a position to adequately present the facts or questions of law.

Rule 36 of the United States Supreme Court Rules sets forth in subsection .1 the circumstances under which a third party may file a brief of an amicus curiae **prior** to consideration of the jurisdictional statement or **of the petition for writ of certiorari**. Such a brief should only be filed when it is accompanied by a written consent of the **parties** and within the time which is allowed for the filing of a motion to dismiss or affirm or the brief in opposition to the petition for certiorari. Rule 36.1 specifically states that "[a] motion for leave to file such a brief [amicus curiae] when consent has been refused **is not favored**." (Emphasis added).

In the instant case, the American Planning Association has been refused the consent of Respondents. Yet despite that refusal and the language of Rule 36.1, the American Planning Association has filed a motion for leave to file a brief amicus curiae.

The filing of the Motion for Leave by the American Planning Association becomes even more curious when one examines its reasons for asking permission to file a Brief Amicus Curiae. The American Planning Association makes a factual assumption which is not true. In its Motion, the American Planning Association states that Missouri Court of Appeals, Western District concluded that the Village of Oakwood's zoning ordinance "did not violate the substantive due process rights of the landowners **notwithstanding the total absence of any plan, planning process or procedure**." In the same manner in which the Petitioners improperly interpreted the Missouri Court of Appeals' decision, the

American Planning Association also mischaracterizes that opinion. At no time in the opinion written by Judge Lowenstein is there a statement, express or implied, that a municipality may pass or maintain zoning legislation without any planning for the land within the municipality. The issue before the Missouri Court of Appeals was whether a small village, the size of a small subdivision, was required to adopt a separate written "comprehensive plan" and then pass all of its zoning ordinances pursuant to that "comprehensive plan." The Missouri Court of Appeals found that a village's zoning ordinance did not violate a landowners' constitutional substantive due process rights by not first adopting a separate written "comprehensive plan." In addition, the Court of Appeals found that the Village did have a comprehensive plan which was evidenced by the preamble to the Village's zoning ordinance. Other evidence of the comprehensive plan by the Board of Trustees, the Court of Appeals noted, can be found in their appointment of zoning commissions, holding public hearings, entertaining recommendations and making a final record.

The Missouri Court of Appeals not only limited its decision to the issue of a separate "comprehensive plan", but it also limited its opinion to the facts before it; i.e., a small residential village. On page 18 of the opinion, the Court noted:

> This opinion does not stand for the proposition that a municipality, no matter what its size, does not have to adopt a comprehensive plan

> separate from the zoning ordinance. What was sufficient for Oakwood in this case, an ordinance which provided for a single land use, and which evidenced future plans for the community, will not necessarily suffice for all larger towns or cities.

Id. at 18. Thus, this case, contrary to the assertion by the American Planning Association, will not affect state, city and county planners throughout the country. The decision will have no application to other cities with the exception of small residential bedroom villages in states with zoning legislation that is substantially similar to the State of Missouri.

Finally, the proposed Brief Amicus Curiae included with the American Planning Association's Motion for Leave is nothing more than a restatement of the Petitioners' Brief contained in their Petition for Writ of Certiorari. Throughout its Brief, the American Planning Association equates the lack of a separate written "comprehensive plan" with no planning of any kind. The opinion of the Missouri Court of Appeals directly contradicts such an assumption. That decision notes that the Trustees of Oakwood did go through a planning process from the beginning as noted above. In addition, during the last forty years, the Board of Trustees has considered the needs of the Village and its residents in the amendments that have added from time to time to the main zoning ordinances. The Village also employed a land planner to review the zoning ordinances as to both their current effect and possible future considerations on the land within the Village. The land planner advised the

Village that it would be proper to continue its current single family residential zoning for all of the eighty lots within the Village.

CONCLUSION

The Village of Oakwood requests that this Court deny the Motion for Leave to File Brief Amicus Curiae filed by the American Planning Association for the reasons set forth herein. Alternatively, if this Court grants such leave to the American Planning Association, Respondents pray that this Court should deny the Petition for Writ of Certiorari filed by the Petitioners in that they have wholly failed to establish any basis for granting a writ of certiorari.

Respectfully submitted,

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